87 492

No.

Supreme Court, U.S.
FILED
SEP 25 1987
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES W. COLLYER, II, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

COLONEL LEO L. SERGI
(Counsel of Record)
CAPTAIN HENRY J. SCHWEITER
Defense Services Division
Office of The Judge Advocate General of The Air Force
Bolling AFB
Washington, DC 20332-6128
(202) 767-1562
Attorneys for Petitioner

30 pp

QUESTION PRESENTED

Whether petitioner's Fourth and Fifth Amendment rights were violated, in contravention of *Brewer v. Williams*, 430 U.S. 387 (1977) and *Edwards v. Arizona*, 451 U.S. 477 (1981), by an investigator's unlawful solicitation of petitioner's consent to search his person and his automobile, following instructions to that investigator by petitioner's counsel to avoid further contact with petitioner, where petitioner's right to counsel had been exercised.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and Statutory Provisions	1-2
Statement of the Case	2
Reasons for Granting Writ	3
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Brewer v. Williams, 430 U.S. 387 (1977)	(i), 7
Edwards v. Arizona, 451 U.S. 477 (1981)	passim
Escobedo v. Illinois, 378 U.S. 478 (1964)	5
Kirby v. Illinois, 406 U.S. 682 (1972)	6
Michigan v. Jackson, 475 U.S. 625 (1986)	6
Michigan v. Mosley, 423 U.S. 96 (1975)	7
Miranda v. Arizona, 384 U.S. 436 (1966)	5, 6,8
Moran v. Burbine, 475 U.S. 412 (1986)	6
Oregon v. Bradshaw, 462 U.S. 1039 (1983)	5
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	5, 6
United States v. Applewhite, 23 M.J. 196 (C.M.A. 1987)	5
United States v. Collyer, __ M.J. __ (C.M.A. 1987)	4
United States v. Harris, 19 M.J. 331 (C.M.A. 1985)	5
United States v. Mendenhall, 446 U.S. 544, (1980)	6
United States v. Roa, 24 M.J. 297 (C.M.A. 1987)	passim
United States v. Tempia, 16 U.S.C.M.A 629, 37 C.M.R. 249 (1967)	5, 6
United States v Watson, 423 U.S. 411 (1976)	6
United States v. Wattenberger, 21 M.J. 41 (C.M.A. 1985)	6

Page

Constitutions and Statutes:

U.S. Const. Amend. 4 ..... passim
U.S. Const. Amend. 5 ..... passim
U.S. Const. Amend. 6 7
28 U.S.C. § 1259(3) (Supp. III 1985) 1

Uniform Code of Military Justice:

Article 67(h), 10 U.S.C. § 867(h) (Supp. III 1985) . 1

Miscellaneous:

Exec. Order No. 12473, 49 Fed. Reg. 17152 (1984) 2
Manual for Courts Martial, 1984
Mil.R.Evid, 305(a) 2
Mil.R.Evid. 305(e) 2
Mil.R.Evid. 305(f) 2, 5
Mil.R.Evid. 314(e) 6

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. -

JAMES W. COLLYER, II, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

James W. Collyer, II respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on July 28, 1987.

Opinions Below

The decision of the United States Air Force Court of Military Review was issued on August 19, 1985 and is reproduced in the Appendix to this Petition. The decision of the United States Court of Military Appeals is not yet reported. The advance sheet is reproduced in the Appendix.

Jurisdiction

The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h) (Supp. III 1985) and 28 U.S.C. § 1259(3) (Supp. III 1985). The judgment of the Court of Military Appeals was entered on July 28, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

The Fifth Amendment provides:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

Rule 305 of the Military Rules of Evidence, Manual for Courts-Martial, 1984, Pt. III, Exec. Order No. 12473, 49 Fed. Reg. 17152 (1984), provides, in pertinent part:

> Rule 305. Warnings About Rights
>
> (a) General Rule. A statement obtained in violation of this rule is involuntary and shall be treated under Mil.R.Evid. 304.
>
> * * *
>
> (e) Notice to Counsel. When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.
>
> (f) Exercise of rights. If a person chooses to exercise the privilege against self-incrimination or the right to counsel under this rule, questioning must cease immediately.

Statement of the Case

On 20 March 1985, petitioner was convicted by a general court-martial at RAF (Royal Air Force) Lakenheath, Suffolk, England, on charges of larceny, forgery, making and uttering checks with insufficient funds to cover them, making false official statements and violation of a lawful general regulation. He entered mixed pleas but was convicted on all charges and was sentenced to confinement for five years, a dishonorable discharge and other accessory penalties.

At trial, the defense moved to suppress certain items of physical evidence seized from petitioner pursuant to a search of his person and automobile and a subsequent warrant search

of his residence. (R. 22; App. Exhibit III).[1] The evidence seized during the searches had served in part to supply the probable cause on which the search warrant (search authorization in military parlance) for petitioner's residence was based. (R. 42-44). The trial judge denied the defense motion. (R. 106).

The essential facts giving rise to the motion to suppress evidence began on November 6, 1984, when officials at the RAF Lakenheath branch of the American Express International Banking Corporation (AMEXCO), at which petitioner had a checking account, became suspicious that petitioner and two other persons, James J. Coll and James J. Colby, were all one and the same person. (R. 37). This conclusion was based upon handwriting comparison of various bad checks negotiated at that bank which bore those names in the signature block with information from petitioner's account. (R. 38-39). When suspicion focused on petitioner, he was brought by base investigative authorities to their offices for questioning. (R. 40).

Earlier that day, petitioner had visited the base area defense counsel, the military analogue to a public defender, one Major Curtin. (R. 41). Major Curtin and petitioner entered into an attorney-client relationship at that time. (R. 41). When petitioner was brought to the Air Force Office of Special Investigations (OSI) building for questioning, Major Curtin was already on the phone waiting to speak to the questioning agents. (R. 40-41). While petitioner waited in an interview room, the lead agent, Special Agent Lukens, telephonically spoke to Major Curtin. Major Curtin advised Special Agent Lukens that he represented petitioner, and Major Curtin then had a private telephone conversation with petitioner (R. 41). After this conversation, Major Curtin again got on the phone with Special Agent Lukens. The agent

---

[1] Notwithstanding petitioner's guilty pleas to most of the individual counts against him, Rule for Court-Martial (R.C.M.) 910(a)(2) provides for conditional guilty pleas, in which and upon consent of the prosecution, adverse determinations of specified pretrial motions are preserved for appellate review. Petitioner's pleas in this case were conditional. If an accused prevails on appeal, the rule authorizes withdrawal of the previously entered plea. (App. Exhibit XVII; R. 107-108).

was instructed that petitioner was not going to answer questions or be interviewed and that he "didn't have anything to say." (R. 41). Major Curtin also told Special Agent Lukens to send petitioner to his (Curtin's) office. (R. 40). Before allowing petitioner to leave the OSI office, however, Special Agent Lukens asked for and received from petitioner consent to search his person and his automobile. (R. 42).

The search of petitioner disclosed a letter from the AMEXCO bank to petitioner (stating that he had written over five thousand dollars in dishonored checks), five hundred dollars in cash, credit cards, check guarantee cards, and a gas ration book. (R. 42-43). Following this search, a warrant was obtained to search petitioner's residence. (R. 43-44). There, his car and his house were searched, and various items of evidence, including a Chartpak electronic marking kit, stencils in the name of James J. Colby, a checkbook, and an authorized signature card, were seized. (R.45-46; App. Exhibit IX).

On mandatory review before the Air Force Court of Military Review, petitioner's convictions and sentence were summarily affirmed. The Court of Military Appeals granted discretionary review on essentially the same issue presented here. 22 M.J. 94 (C.M.A. 1986). That court ultimately affirmed, relying on its own precedent in the case of *United States v. Roa*, 24 M.J. 297 (C.M.A. 1987).[2] Judge Sullivan dissented, citing his concurring opinion in *United States v. Roa*. In that case, he had suggested that a request of an accused for consent to search knowing the person to be represented by counsel and after an assertion of the right against self incrimination violates the "bright line" rule of *Edwards v. Arizona*, 451 U.S. 477 (1981) (quotation added). 24 M.J. at 303.

Reasons for Granting the Writ

The erroneous perspective employed below by the government in its argument and by the Court of Military Appeals centered about a Fifth Amendment analysis, addressing only

---

[2] Each of the three judges of the Court of Military Appeals wrote a separate opinion in the *Roa* case, highlighting the need for this Court to resolve this issue. (Appendix C).

the question of whether a request for (or the giving of) consent to search involves an interrogation (or self-incrimination), *United States v. Roa, supra.* Such was not, and is not, the claim made by petitioner. Petitioner asserts, instead, that, having invoked his right to counsel, and having had his counsel prohibit the police from engaging in any further questioning of petitioner *for any purpose*, the action of the police in violating their agreement with petitioner's counsel rendered the obtaining of the "consent" to search involuntary. While we recognize and do not dispute the prior decisions of this Court holding that a request for a consent to search has no Fifth Amendment impact, *see, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 241-242 (1973), the circumvention by the police of a suspect's attorney-client relationship does, we submit, raise an issue which must be considered under a traditional, Fourth Amendment, "voluntariness" analysis, and it is in this context that certain Fifth Amendment principles are applicable *by analogy.*

If an accused "indicates in any manner and at any stage of the process that he wishes to consult with an attorney there can be no questioning." *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); Mil.R.Evid. 305(f). Furthermore, "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." *Edwards v. Arizona, supra,* at 484-85 (1981). *See also, Oregon v. Bradshaw,* 462 U.S. 1039 (1983); *United States v. Applewhite,* 23 M.J. 196 (C.M.A. 1987); *United States v. Harris,* 19 M.J. 331 (C.M.A. 1985). This rule recognizes that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated interrogation even if he has been advised of his rights." 451 U.S. at 484. *See also, Escobedo v. Illinois,* 378 U.S. 478 (1964). The purpose of the warnings mandated in *Miranda*, and subsequently required in the military in *United States v. Tempia,* 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) is

"to dissipate the *compulsion* inherent in custodial interrogation and, in so doing, guard against abridgement of the suspect's Fifth Amendment rights." *Moran v. Burbine,* 475 U.S. 412, 89 L.Ed.2d. 410, 423 (1986) (emphasis added). *See also, Kirby v. Illinois,* 406 U.S. 682, 688 (1972) (plurality opinion). Thus, in custodial interrogation situations, the right to counsel has been applied derivatively by the Supreme Court as a component of the Fifth Amendment in order to protect the suspect from coercive aspects of custodial interrogations. *See, Edwards* and *Miranda, both supra; see also, United States v. Wattenberger,* 21 M.J. 41, 43 n.1 (C.M.A. 1985).

In this case, the same fundamental considerations of voluntariness which have been applied to justify Fifth Amendment protections in a custodial interrogation situation should be considered in evaluating petitioner's "consent" to search. The starting point in this analysis is this Court's long standing recognition that the validity of any consent to search, whether obtained from one in custody or not, hinges on whether the consent was voluntary under the totality of the circumstances. *United States v. Mendenhall,* 446 U.S. 544, 557 (1980); *United States v. Watson,* 423 U.S. 411 (1976); *Schneckloth v. Bustamonte, supra*; *see* Mil.R.Evid. 314(e). Theoretically and practically, there is no distinction in circumstance sufficient to justify application of anything less than the *Edwards v. Arizona* rule to requests for consent to search. If *Edwards* operates to foreclose interrogation once the rights embraced by that case are asserted, it is semantic artifice to say that the same rights should not be so applied in a Fourth Amendment context. *Cf., Michigan v. Jackson,* 475 U.S. 625 (1986) (holding that if police initiate interrogation after an accused asserts his Sixth Amendment right to counsel, any waiver of the right to counsel for that interrogation is invalid). For example, it would be ludicrous to contend that the typical criminal suspect, a layman uneducated in the intricacies of constitutional law, knows that by invoking his right to counsel, he is only seeking legal advice in a Fifth Amendment context; the suspect undoubtedly retains an attorney for assistance in the preservation of *all* of his constitutional rights, including those guaranteed by the Fourth Amendment.

The constitutional question here is not unlike that faced by this Court in *Brewer v. Williams*, 430 U.S. 387 (1977). In that case a police officer functionally interrogated the defendant while driving him to Des Moines, Iowa despite having previously agreed with his attorney not to question him. Although analyzed in terms of the Sixth Amendment right to counsel, the Court held that the defendant had effectively asserted his right to counsel by having his attorneys, acting in an agency capacity, make clear to the police that no interrogation was to occur during the journey. 430 U.S. at 405. The analysis of *Brewer v. Williams* is persuasive in petitioner's case. As in *Brewer*, Major Curtin's direction to investigative agents not to question petitioner and that petitioner "had nothing to say," underscores broad based representation for all constitutional purposes – as a matter of federal constitutional law – not for purposes limited to the Fifth or any other particularized amendment. To say otherwise would be to impute to petitioner and laymen like him the foreknowledge of vague constitutional concepts and law and a competency to distinguish among those principles that in reality cannot fairly be said to exist. As Justice White said, concurring in the result in *Michigan v. Mosley*, 423 U.S. 96 (1975):

> "[T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wished legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism."

423 U.S. at 110, n.2 (White, J., concurring in the result).

As a consequence of both the representation by counsel and the invocation of constitutional rights, the critical transgression is the reinitiation of contact with the petitioner in violation of the sanctity of the assertion and instruction by counsel.

This violation undermines the values sought to be protected by decisions like *Miranda* and *Edwards*. It was only through a limited but clever violation of petitioner's attorney-client relationship by the police that the transgression here related to a Fourth Amendment issue, and it is irrelevant whether the information sought to be elicited was incriminatory. The question is one of fundamental voluntariness and preserving the protections guaranteed in that regard by the Fourth Amendment. A custodial "consent" obtained through an intentional disregarding of a suspect's attorney's instructions is no more voluntary than is the "waiver" of a Fifth Amendment right to remain silent which might be obtained in violation of *Edwards*. The holding of the lower courts to the contrary are anomalies which beg to be corrected. *See, United States v. Roa, supra.*

This case demonstrates the need to apply the prophylactic rule of *Edwards* in the limited context of those instances where attorneys representing suspects unequivocally convey to police an instruction not to further communicate with that suspect. Such a rule is necessary to ensure scrupulous police adherence to constitutional protections, and recognizes that, regardless of how the right to counsel is involved, laymen cannot be expected to (and do not) particularize their invocation of that right within the context of any other specific amendment within the Bill of Rights. The suspect who asks for assistance of counsel does so in order to avail himself of that assistance for all purposes related to his case. The police should not be allowed to frustrate that purpose.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

COLONEL LEO L. SERGI
(Counsel of Record)
CAPTAIN HENRY J. SCHWEITER
Defense Services Division
Office of The Judge Advocate
General of The Air Force
Bolling AFB
Washington, DC 20332
(202) 767-1562
Attorneys for Petitioner

SEPTEMBER 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 53914/AF
CMR Dkt. No. 24859

UNITED STATES, APPELLEE

v.

JAMES W. COLLYER, II (253-72-3821),
APPELLANT

ORDER

On consideration of the specified issue (22 M.J. 94) in light of *United States v. Roa*, 24 M.J. 297 (C.M.A. 1987), it is by the Court this 28th day of July, 1987.

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

SULLIVAN, Judge (dissenting):

I dissent. *See* my separate opinion in *United States v. Roa*, 24 M.J. 297, 302 (Sullivan, J., concurring in the result).

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 24859

UNITED STATES

v.

STAFF SERGEANT JAMES W. COLLYER, II, FR 253-72-3821
UNITED STATES AIR FORCE

---

19 AUG 1985

Sentence adjudged 20 March 1985 by GCM convened at Royal Air Force, Lakenheath, England. Military Judge: N. Steven Linder (sitting alone).

Approve sentence: Dishonorable discharge, confinement for four (4) years and nine (9) months, forfeiture of all pay and allowances and reduction to airman basic.

Before
SESSOMS, CANELLOS and CARPARELLI
Appellate Military Judges

DECISION

PER CURIAM:

The approved findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, are affirmed.

OFFICIAL:

/s/ ELVA J. SMITH
ELVA J. SMITH
Documents Examiner
Court of Military Review

APPENDIX C

UNITED STATES COURT OF
MILITARY APPEALS

No. 53,581.
ACM 24730.

UNITED STATES, APPELLEE,

v.

MICHAEL A. ROA, SENIOR AIRMAN, U.S.
AIR FORCE, APPELLANT.

July 27, 1987

Accused, senior airman, United States Air Force, was convicted by military judge sitting as general court-martial of three specifications of dereliction of duty, three specifications of larceny, two specifications of burglary, housebreaking, and false swearing. The United States Air Force Court of Military Review, 20 M.J. 867, affirmed. Review was granted. The United States Court of Military Appeals, Cox, J., held that request for consent to search accused's off-base storage locker did not violate accused's right to counsel under Fifth or Sixth Amendments.

Affirmed.

Everett, C.J., and Sullivan, J., filed separate opinions concurring in result.

Opinion

COX, Judge:

After mixed pleas, appellant was convicted by a military judge sitting as a general court-martial of dereliction of duty (three specifications), larceny (three specifications), burglary

(two specifications), housebreaking, and false swearing, in violation of Articles 92, 121, 129, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 921, 929, 930, and 934, respectively. His sentence to confinement for 4 years, partial forfeitures, reduction to E-1, and a dishonorable discharge was approved by the convening authority. The Court of Military Review affirmed. 20 M.J. 867 (1985).

We granted review of the following specified issue:

> WHETHER THE EVIDENCE OBTAINED FROM THE SEARCH OF THE ACCUSED'S OFF-BASE STORAGE LOCKER WAS OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL.

I hold that the request for consent to search did not violate appellant's right to counsel under the Fifth or Sixth Amendments of the United States Constitution; Article 27, UCMJ, 10 U.S.C. § 827; *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976); or Mil.R.Evid. 305(e), Manual for Courts-Martial, United States, 1969 (Revised edition).

On March 17, 1984, appellant and Captain Dennis Reimer, both stationed at Davis-Monthan Air Force Base, Arizona, were arrested by Tucson police officers while fleeing the scene of a burglary. Two days later, Agent Freddie L. Myloyde of the Air Force Office of Special Investigations (OSI) called appellant's commander and asked that appellant report to the OSI office. Agent Myloyde planned to question appellant about other burglaries that he was investigating. After being advised of his rights, appellant stated that he wanted to talk with his civilian attorney. No attempt was made to interrogate appellant, but Agent Myloyde asked appellant to return to the OSI office after consulting with his lawyer.

That same morning the Tucson police detective working on appellant's case stopped by the OSI office and briefed Agent Myloyde on his independent investigation. Among other things, he informed Agent Myloyde that he had received a phone call from the manager of Kolb Road Self-Storage, reporting that both appellant and Captain Reimer had rented units at his self-storage facility. The manager recognized their names from a newspaper account of the arrest.

Later that afternoon, Agent Myloyde ascertained that appellant had not returned to the OSI office. He called appellant's commander and asked that appellant again report to the OSI office. Appellant arrived shortly thereafter and was asked if he had talked to his lawyer yet. Appellant replied that he had and that he was "advised . . . not to discuss the investigation." Agent Myloyde then asked appellant for consent to search his locker at Kolb Road Self-Storage, his car, and his house. Appellant indicated he would consent but stated that he wanted to talk to his lawyer prior to signing the consent form. Agent Myloyde advised appellant he could refuse to consent, but appellant "still indicated that he would be willing to consent." For 25-to-30 minutes, appellant tried calling his lawyer but was unable to get in touch with him. Appellant then told Agent Myloyde "that he would go ahead and sign the [consent-to-search] form and" inform his lawyer of this later.

The consent-to-search form provided, in part:

> I know that I have an absolute right to give my consent to a search. I understand that, if I do consent to a search, anything found in the search can be used against me in a criminal trial or in any other disciplinary or administrative procedure. I also understand that, if I do not consent, a search cannot be made without a warrant or other authorization recognized in law.

A search of the storage locker revealed a cache of property later determined to be stolen. Appellant subsequently withdrew his consent, so his house and car were not searched on the basis of consent.

The defense made a timely motion at trial to suppress the results of the search, contending that appellant's consent to search was obtained in violation of his right to counsel. The military judge and the Court of Military Review concluded otherwise, however, recognizing the fundamental difference between waiver of the Fourth-Amendment right against unreasonable searches and the Fifth-Amendment right against compelled self-incrimination.

The Fourth Amendment protects one's privacy against unreasonable searches and seizures by the police. A constitu-

tionally valid basis for a reasonable search is consent. Unlike the per se rules applicable to admissibility of a statement obtained in a custodial interrogation, the validity of a consent to search, whether obtained from one in custody or not, hinges on whether the consent was voluntary under the totality of the circumstances. *United States v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). *See* Mil.R.Evid. 314(e). No one factor is dispositive.

A limited Fifth-Amendment right to appointment and presence of counsel at a custodial interrogation has evolved "to dissipate the compulsion inherent in custodial interrogation, and, in so doing, guard against abridgment of the suspect's Fifth Amendment Rights" *Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135, 1143, 89 L.Ed.2d 410 (1986). Counsel's presence at a custodial interrogation is believed to assure "that statements made in the government-established atmosphere are not the product of compulsion," thereby enhancing "the integrity of the fact-finding processes in court." *Miranda v. Arizona,* 384 U.S. 436, 466, 86 S.Ct. 1602, 1623, 16 L.Ed.2d 694 (1966). On the other hand, Fourth-Amendment protections have "nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." *Schneckloth v. Bustamonte, supra* 412 U.S. at 242, 93 S.Ct. at 2055.

To safeguard the Fifth Amendment's privilege against compelled self-incrimination, the prophylactic rule of *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), requires that when an accused invokes his right to have counsel present during custodial interrogation, questioning must cease "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85, 101 S.Ct. at 1884-85. *See United States v. Applewhite,* 23 M.J. 196 (C.M.A. 1987). However, the privilege against self-incrimination protects only testimonial evidence, not physical evidence. *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *United States v. Lloyd,* 10 M.J. 172 (C.M.A. 1981). *See* Mil.R.Evid. 305(d)(1). Neither

Article 31, UCMJ, 10 U.S.C. § 831, nor Fifth-Amendment safeguards are infringed in a request for consent to search, as such a request is not interrogation, and the consent thereby given is not a statement. *United States v. Morris,* 1 M.J. 352, 354 (C.M.A. 1976); *United States v. Rushing,* 17 U.S.C.M.A. 298, 38 C.M.R. 96 (1967); *United States v. Insani,* 10 U.S.C.M.A. 519, 28 C.M.R. 85 (1989); *United States v. Thompson,* 12 M.J. 993, 996 (A.F.C.M.R. 1982); *United States v. Rice,* 3 M.J. 1094, 1102-1103 (N.C.M.R.), pet. denied, 4 M.J. 163 (1977). See United States v. Stoecker, 17 M.J. 158 (C.M.A. 1984).

"The fact that consent was given is neutral and has no tendency to show that the accused was guilty of any offense." *United States v Spivey,* 10 M.J. 7, 10 (C.M.A. 1980) (Everett, C.J., concurring in the result). Consent is not in itself incriminating; it merely provides a legal basis to conduct a search which "obviates recourse by the Government to other alternatives of lawful action that may be open to it." *United States v. Rushing,* 17 U.S.C.M.A. at 303, 38 C.M.R. at 101. *Cf. United States v. Nowling,* 9 U.S.C.M.A. 100, 25 C.M.R. 362 (1958) (accused was suspected of pass violation, so policeman should have given Article 31 warnings before asking him to display pass); *United States v. Taylor,* 5 U.S.C.M.A. 178, 17 C.M.R. 178 (1954) (suspect should have been warned under Article 31(b) before being asked to identify his clothing).

Because he was already represented by counsel, a fact well known to investigators, appellant maintains that his consent to search was obtained in violation of his Sixth-Amendment right to counsel. I reject the notion that the Sixth-Amendment right to counsel attaches at the point of interrogation merely because the suspect has retained counsel. The Supreme Court has explicitly addressed this argument, stating:

> [T]he suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purposes of the right to counsel. The Sixth Amendment's intended function is not to wrap a protective cloak around the

> attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure that in any "criminal prosecutio[n]," U.S. Const., Amdt. 6, the accused shall not be left to his own devices in facing the " 'prosecutorial forces of organized society.' " *Maine v. Moulton*, . . . [474 U.S. 159] 106 S.Ct. [477] at 484 [88 L.Ed.2d 481], (quoting *Kirby v. Illinois*, 406 U.S. [682] at 689 [92 S.Ct. 1877, at 1882, 32 L.Ed.2d 411], . . .). By its very terms, it becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the "intricacies . . . of law," *ibid.*, is needed to assure that the prosecutor's case encounters "the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 [104 S.Ct. 2039, 2045, 80 L.Ed.2d 647] . . . (1984).

Moran v. Burbine, 106 S.Ct. at 1146.

Appellant also contends that the rule in *United States v. McOmber, supra*, was violated by the investigator's failure to notify counsel when he requested appellant's consent to search. Relying on Article 27, rather than constitutional grounds, we held in *McOmber* that

> [o]nce an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, futher *questioning* of the accused without affording counsel reasonable opportunity to be present renders any *statement* obtained involuntary under Article 31(d) of the Uniform Code.

1 M.J. at 383 (emphasis added). The purpose of *McOmber* and its progeny is to protect the right to counsel under Article 27 by assuring counsel a reasonable opportunity to be present at any interrogation of the accused. *United States v. Dowell*, 10 M.J. 36, 40 (C.M.A. 1980). The notice-to-counsel requirement of *McOmber* has been incorporated into Mil.R.Evid. 305(e). By its terms, *McOmber*, as well as Mil.R.Evid. 305(e), is inapplicable to a request for consent to search, as such a request is not questioning in the sense of "interrogation," and consent obtained is not a "statement" under Article 31. *United States*

v. Rushing, United States v. Insani, and *United States v. Rice,* all *supra. See United States v. Stoecker,* 17 M.J. at 161-62.

"Consent to a search, like consent to the taking of a sample of blood or fingerprints, is not subject to manipulative conditions which endanger or derogate from the accused's right to a fair trial." *United States v. Rushing,* 17 U.S.C.M.A. at 303, 38 C.M.R. at 101. Thus, there is no compelling need to create yet another prophylactic rule by expanding *McOmber* to require that counsel be given an opportunity to monitor search requests. I am not persuaded that this is necessary to assure effective legal representation or to promote the truth-finding process. Whether consent to search was freely and voluntarily given can properly "be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte, supra* 412 U.S. at 227, 93 S.Ct. at 2047. *See United States v. Wallace,* 11 M.J. 445 (C.M.A. 1981).

If the investigators had refused appellant the opportunity to contact his counsel or neglected to advise him that he could refuse to consent to the search, that would weigh heavily against a determination that the consent was voluntary. It is undisputed, however, that appellant was given the opportunity to contact his lawyer. When he was unable to reach him, appellant did not request a postponement until he could consult with his lawyer. Instead, *he* suggested proceeding with the search and informing his lawyer later. It is also clear that appellant was aware that he did not have to consent to the search and that anything discovered thereby could be used against him. The determination by the military judge that appellant voluntarily consented to the search of his storage locker is fully supported by the evidence.*

---

* Although I agree with Chief Judge Everett's concern regarding use of a communication to establish a proprietary interest in the item searched, that is not a problem here. Certainly, it was not viewed as such by defense counsel, who did not object on that basis at trial. Furthermore, as appellant's "communication" was not introduced into evidence on the merits, it does not appear that it was used by the factfinder in determining guilt.

I disagree with Judge Sullivan that the concept of inevitable discovery under *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377

The decision of the United States Air Force Court of Military Review is affirmed.

EVERETT, Chief Judge (concurring in the result):

The lead opinion points out that *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), is intended to protect the privilege against self-incrimination guaranteed by the Fifth Amendment. Article 31, Uniform Code of Military Justice, 10 U.S.C. § 831, has a similar purpose. *United States v. Howard*, 5 U.S.C.M.A. 186, 17 C.M.R. 186 (1954); *United States v. Eggers*, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953). Their concern is with interrogation, rather than with unreasonable searches and seizures.

United States v. McOmber, 1 M.J. 380, 382 (C.M.A. 1976), established requirements to which military investigators are subject "when they wish to *question* the suspect." (Emphasis added.) Likewise, Mil.R.Evid. 305(e) calls for notice to counsel if investigators intend "to question" a suspect. In this context, questioning is far different from requesting consent to a search.

Indeed, interrogation is for the purpose of eliciting from a suspect communications about the matter under investigation. However, a consent to search does not of itself communicate any information about the investigated crime; and it is not a statement regarding an offense, *see* Art. 31(b). Therefore, requesting consent to search property in which a suspect has an interest is not prohibited by his prior request

---

(1984), is applicable under the facts of this case. The police detective testified that there was no move underway to obtain a search warrant at the time consent to search appellant's locker was requested, as they had no probable cause. The day after the consent search, a warrant was obtained to search the locker. The detective testified, however, that absent the information obtained from the consent search of the locker, they would not have had probable cause to obtain a search warrant at that time. Neither the military judge nor the Court of Military Review made any findings regarding inevitable discovery. Thus, I am not convinced that the evidence in the locker would have ultimately and inevitably been discovered by lawful means absent the consent search. *Cf. United States v. Silvestri*, 787 F.2d 736 (1st Cir. 1986); *United States v. Cherry*, 759 F.2d 1196 (5th Cir. 1985); *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117, 105 S.Ct. 2362, 86 L.Ed.2d 262 (1985).

for counsel, because *Edwards* provides protection only as to interrogation. Denial of a suspect's request for counsel, along with other circumstances, is to be considered in determining whether his consent was given voluntarily, but it is not a decisive fact. *Cf. Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Thus, the request for counsel did not preclude the military judge from ruling that Roa's consent to search his locker was voluntary.

A distinction must be made, however, between granting consent to search property which already has been identified by law-enforcement agents and identifying property for those agents. Thus, in *United States v. Taylor,* 5 U.S.C.M.A. 178 17 C.M.R. 178 (1954), this Court ruled that Article 31(b) had been violated when, in response to a request that he point out his clothing, the suspect identified an overcoat in which two marijuana cigarettes were found.

The Supreme Court has recognized that authentication or identification of documents may constitute a testimonial utterance. *Cf. United States v. Doe,* 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984); *Fisher v. United States,* 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). As observed by the Court in *Fisher:*

> The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Complaince with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena.

Id. at 410, 96 S.Ct. at 1580. Therefore, *Edwards* precludes an investigator from asking a suspect to communicate any information as to the location of his property after he has made a request for counsel.

According to the testimony of Dennis J. Morgan, a detective with the Tucson, Arizona, Police Department, the police had received a phone call from Mr. Riesing, the manager of a local self-storage facility, who "had read in the paper of the arrest involving the Air Force personnel. He advised that he

recognized both names as customers of his who had storage facilities at his business." Morgan furnished this information to OSI Agent Myloyde, who was participating in the investigation of several burglaries of which Roa was suspected.

Myloyde then asked appellant "if he would sign a consent to search form for his residence, for his storage facility", and for his vehicle. Ultimately Roa executed this form; and the three men proceeded to the self-storage facility, where they met Riesing. "We went to the facility that *Airman Roa advised us was his storage facility*. Airman Roa took a key and unlocked the lock and opened the door." (Emphasis added.)

In my view, when Roa "advised" the two investigators which locker was his, *Edwards* was violated. *Cf. United States v. Applewhite*, 23 M.J. 196 (C.M.A.1987). This violation of Roa's Fifth-Amendment rights did not vitiate the consent to search which he had already given. However, it precluded use of any tacit or express communication by appellant to link him to the locker in which untimately the contraband was found.

Although it appears to me that apellant's communication was used by the factfinder to establish his proprietary interest in the locker where the stolen property was found, I conclude that this error was not prejudicial. Riesing, the manager of the self-storage facility, had originally informed the police that Roa and a confederate, Captain Reimer, each had a locker there. Riesing was present when the two investigators brought appellant to the facility; and he possessed the contracts which Roa and Reimer had signed for their respective lockers. Each of these contracts was shown to the investigators before they left the facility; and each contained the name of the renter and the number of his locker.

If Roa had not identified his locker, its location could have been determined by the investigators quite readily. They could simply have checked the number on the lease signed by Roa. Under the circumstances, I would apply a variant of the doctrine of inevitable discovery. *Cf. Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986); *United States v. Kozak*, 12 M.J. 389 (C.M.A.1982). Even if investigators initially determined the location of Roa's locker in an imper-

missible manner – namely, by asking him – and even if this identification was part of the government evidence at trial, appellant was not prejudiced. His lease, the contents of which were available to the investigators at the time and later were available to the court-martial, provided all the information necessary to determine which was Roa's locker.

Furthermore, at trial, the defense did not raise any objection that, since he had identified a particular locker, Roa's privilege against self-incrimination was violated. If a specific objection had been made concerning admissibility of the locker identification, the Government could readily have presented other evidence to establish which locker had been rented by appellant.

Even though here we have a basis for affirming, this case demonstrates the problems that may arise if, despite a request for counsel, an investigator asks a suspect for consent to search his property. In the first place, the absence of counsel may tend to make the voluntariness of the consent more questionable. Even more importantly, it may be difficult to obtain consent without eliciting some incriminating admissions – especially in the form of authentication or identification of evidence. Thus, after a request for counsel, the safest course is for the investigator to deal with the suspect's attorney, rather than to rely on the distinction between consent and communication.

SULLIVAN, Judge (concurring in the result):

The only aspect of this case that troubles me is the questioning of appellant while in custody. In my view, all questioning should have ceased since appellant was in custody, had secured counsel, and had unequivocally asserted his rights under Article 31, Uniform Code of Military Justice, 10 U.S.C. § 831. Cf. *Connecticut v. Barrett*, ___ U.S. ___, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987). After informing the OSI investigators that he had counsel and that counsel had instructed "him not to discuss the investigation" with the OSI, appellant was further asked for consent to search his off-base rented storage locker. This was one question too many. *See generally Arizona v. Mauro*, ___ U.S. ___, 107 S.Ct. 1931,

95 L.Ed.2d 458 (1987). Asking appellant's consent to search was a violation of the bright-line rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Therefore, normally it would be error to admit any evidence found as a result of such a violation. *See generally Colorado v. Spring*, ___ U.S. ___, 107 S.Ct. 851, 856, 93 L.Ed.2d 954 (1987); *Nix v. Williams*, 467 U.S. 431, 442, 104 S.Ct. 2501, 2508, 81 L.Ed.2d 377 (1984). *Cf. Michigan v. Tucker*, 417 U.S. 433, 445-47, 94 S.Ct. 2357, 2364-65, 41 L.Ed.2d 182 (1974).

However, the exclusionary rule does not require suppression of the evidence found in appellant's storage locker. *See generally United States v. Kozak*, 12 M.J. 389 (C.M.A.1982). The record is clear that law-enforcement officials employing proper procedures would have inevitably discovered all relevant evidence in this locker even if appellant had refused to consent to the search. At the time the OSI asked appellant for his consent, the Tucson police and the OSI both knew:

1. There was a string of similar but unsolved burglaries involving the theft of many items prior to March 17, 1984.

2. On March 17, 1984, appellant and Captain Reimer were arrested in the process of commiting a burglary off-base.

3. Appellant had confessed to the Tucson police about his participation with Captain Reimer in committing that burglary as well as a number of other burglaries in the Tucson area.

4. The owner of the rental storage locker warehouse, after reading a newspaper account of appellant's and Captain Reimer's participation in the March 17 burglary, informed the police that *both* appellant and Reimer had rented storage lockers in his warehouse.

5. The types of items taken in the burglaries were items that could be concealed in a rental storage locker.

With this knowledge, the Tucson police could,* and in my view should, have obtained a warrant from a local judge

---

* The police officer's opinion to the contrary (R. 217) is not controlling. *See Florida v. Royer*, 460 U.S. 491, 507, 103 S.Ct. 1319, 1329, 75 L.Ed.2d 229 (1983) (plurality opinion).

authorizing a search of appellant's rental storage locker. Thus, even without appellant's consent, the police, using proper procedures, would have inevitably discovered the items in the locker. As the Supreme Court said in *Nix v. Williams*, 467 U.S. at 444, 104 S.Ct. at 2509:

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received.

(Footnote omitted.) In the instant case, the doctrine of inevitable discovery removes any taint to the evidence obtained as a result of the improper questioning of appellant. These words of the Supreme Court in *Nix* are especially applicable here: "The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct." *Id.* at 443 n. 4, 104 S.Ct. at 2509 n. 4.

I join in affirming appellant's conviction.

U.S. GOVERNMENT PRINTING OFFICE 1987 - 193-105/62001